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CLARK et al. v. LANG.

March 13, 1919.

[98 S. E. 673.]

1. Negligence (§ 121 (1)*)—**Presumption—Proof.**—Negligence will not be presumed, but must, like any other fact, be established by evidence direct or circumstantial.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 402.]

2. Negligence (§ 111 (1)*)—**Pleading—Facts and Circumstances.**—In action against owner of mill for damages caused by fire originating in mill, plaintiff cannot recover on mere allegations that defendants were negligent and allowed fire to escape from their premises; it being necessary to state facts and circumstances showing in what respect defendants were negligent.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 131-2.]

3. Negligence (§ 139 (8)*)—**Instructions—Persons Liable.**—In action for damages caused by fire escaping from a mill, court erred in adding words “or were interested in the proceeds of the business” to a requested instruction that jury could not find against defendants unless they had some control over the engine alleged to have caused the fire; evidence being very meager as to interest of one of defendants, and there being no evidence that the other had any control or was interested in proceeds.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 138-9; 10 Va.-W. Va. Enc. Dig. 412.]

Error to Circuit Court, Buckingham County.

Action by one Lang against C. H. Clark and another. Judgment for plaintiff, and defendants bring error. Reversed.

F. C. Moon and A. L. Pitts, Jr., both of Buckingham, for plaintiffs in error.

Hubard, Gayle & Boatright, of Buckingham, for defendant in error.

KEISTER'S EX'RS v. PHILIPS' EX'X.

March 13, 1919.

[98 S. E. 674.]

1. Appeal and Error (§ 1039 (10)*)—**Harmless Error—Bill of Particulars.**—In a suit on a note, error, if any, in denying defendant's

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

motion based upon Code 1904, § 3249, for a bill of particulars stating the consideration, was harmless, where defendant's allegation that the note was given for stock in a corporation was admitted by plaintiff upon the trial.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 377.]

2. Pleading (§ 316*)—Discretion of Court—Filing Bill of Particulars.—A motion to file a bill of particulars is addressed to the court's discretion and should be sustained, where the pleadings are not so drawn as to give the defendant a proper notice of the particulars of the claim.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 377.]

3. Evidence (§ 271 (5)*—Self-Serving Declarations to Attorney.—Testimony by an attorney, in a suit on a note, that the payee, after the date of an alleged receipt indicating payment, sent him the note for collection, was not a self-serving declaration by the payee, but explained the attorney's possession of the note and tended to prove his principal's ownership.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 344.]

4. Evidence (§ 123 (1)*—Res Gestæ—Statements as to Ownership.—Testimony, by an agent of the payee, that, after the date of an alleged receipt indicating payment, the note was sent him for collection, if considered a declaration by the payee, was admissible in evidence, upon the issue of ownership, as part of the *res gestæ*.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 909.]

5. Pleading (§ 299*)—Verification—Filing of Affidavit—Time.—In an action on a note permitting plaintiff during the trial to file an affidavit under Code 1904, § 3279, denying the genuineness of a signature to an alleged receipt, was not error, the court having a large discretion as to the time of filing such an affidavit.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 455.]

6. Appeal and Error (§ 960 (1)*—Review—Discretion of Court—Filing of Pleadings.—Action of the trial court in exercising its discretion as to the time of filing and perfecting pleadings, will not be reviewed unless clearly erroneous.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 455.]

7. Evidence (§ 197*)—Handwriting—Comparison by Jury.—In view of Code 1904, § 3388, permitting juries to take all documents introduced in evidence with them into the jury room, in an action on a note, in which the payee's signature to a receipt was disputed, specimens of the payee's handwriting, proved to be genuine, were properly received in evidence for comparison by the jury, without aid of expert testimony.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 34.]

8. Trial (§ 234 (7)*—Instructions—Burden of Proof.—Instruction

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that the burden of proving payment of the note sued upon rested upon the defendants held not erroneous as relieving plaintiff of the burden resting on him, defendants having pleaded payment.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 737.]

9. Payment (§ 74 (4)*)—Receipt—Note—Affidavit as to Genuineness.—A receipt is not *prima facie* evidence of payment of note, where the genuineness of the receipt is denied by affidavit.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 77, et seq.]

Error to Law and Chancery Court of City of Norfolk.

Suit by Mary E. Philips, executrix of W. H. Philips, deceased, against M. L. Keister and another, executors of Z. E. Keister, deceased. From a judgment for plaintiff, defendants bring error. Affirmed.

E. R. F. Wells, of Norfolk, for plaintiffs in error.

Edward R. Baird, Jr., of Norfolk, for defendant in error.

SMITH *v.* HOLLAND et al.

March 13, 1919.

[98 S. E. 676.]

1. Exemptions (§ 119 (1)*)—Time for Making Claim—“Subjected.”—Where a creditor levied execution against property and other creditors entered into the controversy claiming prior liens, and there was a decree settling the priorities, which became final at adjournment of term of court, the property was “subjected” under a decree within meaning of Code 1904, § 3642, and judgment debtor could not set apart his homestead.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Subject. For other cases, see 7 Va.-W. Va. Enc. Dig. 95.]

2. Exemptions (§ 119 (1)*)—Time for Making Claim.—Where execution was levied against judgment debtor's property and other creditors entered into controversy which lasted for some time, and a decree was entered disposing of the property between the creditors, the decree which became final after adjournment of term of court, precluded judgment debtor from thereafter setting apart his homestead.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 95.]

3. Judgment (§ 713 (2)*)—Res Judicata—Matters That Might Have Been Litigated.—The effect of a final decree is not only to con-

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